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No. 82-998

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALAN K. STUART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner seeks review of his conviction for willfully failing to file income tax returns, asserting that evidence obtained through an improper use of Internal Revenue Service (IRS) summonses was erroneously admitted into evidence during trial and that the court of appeals erred in concluding that he could not challenge the evidence because he had contested the summonses in earlier proceedings.

1. Following a jury trial in the United Stated District Court for the Eastern District of Arkansas, petitioner was convicted on three counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203 (Pet. App. A-1). On the first count petitioner was fined $5,000 and was sentenced to one year's imprisonment; on the second and third counts the court suspended sentence, but imposed consecutive one-year terms of probation (Pet. App. A-1). The court of appeals affirmed (Pet. App. A-7).

2. Following receipt from petitioner of a protest document in the form of a 1976 tax return an IRS special agent initiated a joint investigation of petitioner on December 1, 1977 (Tr. 3, 5-A).[1] An IRS revenue agent was assigned to this investigation on December 14, 1977 (Tr. 4). On December 29, 1977, the special agent issued the two summonses at issue for third-party bank records pertaining to petitioner (*ibid.*). On March 10, 1978, the government filed petitions to enforce the summonses, and petitioner intervened to oppose enforcement. Petitioner argued that the summonses had been issued improperly because there was no showing of tax liability and that enforcement would violate his rights under the Fourth and Fifth Amendments (Pet. App. A-3 to A-4). The district court rejected his arguments and, on petitioner's appeal of the enforcement order, the court of appeals affirmed. *United States* v. *Stuart*, 587 F.2d 929 (8th Cir. 1978).

On December 19, 1980, the IRS sent a recommendation for criminal prosecution to the Department of Justice (Tr. 5-A). Subsequently, petitioner was charged with violations of 26 U.S.C. 7203 and he moved to suppress all evidence obtained through use of the summonses. The district court denied the motion (Pet. App. A-7 to A-9) and the court of appeals affirmed (Pet. App. A-3 to A-4).

3. The court of appeals correctly held (Pet. App. A-3 to A-4) that the principle of res judicata precluded consideration of petitioner's claim that the summonses were not issued in good faith since petitioner could have raised this claim in the prior summons enforcement proceeding. See *United States* v. *Bryan*, 339 U.S. 323, 332-335 (1950); *United States* v. *Fleischman*, 339 U.S. 349, 352 (1950);

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[1] "Tr." refers to the transcript of posttrial proceedings regarding the summons issue, held on November 24, 1981.

Maggio v. *Zeitz*, 333 U.S. 56, 68-69 (1948); *United States* v. *First National State Bank*, 616 F.2d 668, 675 (3d Cir. 1980); *United States* v. *Peter*, 479 F.2d 147, 149-150 (6th Cir. 1973); *United States* v. *Secor*, 476 F.2d 766, 769-771 (2d Cir. 1973).

Petitioner's arguments that res judicata should not apply here are without merit. Contrary to his assertion (Pet. 12) that it was impossible for him to discover in the enforcement proceedings the purpose of the summonses (and that he was able to do so only after the liberal discovery permitted in criminal proceedings), it is clear that petitioner had access to the relevant evidence at the enforcement stage. Indeed, in his brief before the court of appeals in this case (at 9-13), petitioner's argument was based solely on facts established by the testimony of the special agent, a witness available to petitioner at the enforcement hearing. Thus, petitioner had ample opportunity in the earlier proceeding to develop all relevant facts regarding the issue of good faith, and he cannot now complain that the principles of res judicata are not fairly applied here. *United States* v. *Bryan, supra; United States* v. *Fleischman, supra; Maggio* v. *Zeitz, supra; United States* v. *First National State Bank, supra.*

Similarly lacking in merit is petitioner's argument (Pet. 12-13) that the doctrine of res judicata should not have been applied because the "[i]ssues before the court in a criminal proceeding are entirely different from the issues which are before the court in a civil proceeding" and the burden of proof differs in civil and criminal proceedings. Whether the question of improper use of a summons arises in enforcement proceedings or in a criminal case, the issue is the same. Although the standard of proof on the ultimate issue of guilt in a criminal case differs from the standard of proof on the ultimate issue in a civil case, there is no difference in the

standard of proof when the question is whether enforcement should be denied because a summons has been used improperly or whether evidence should be suppressed for the same reason.[2] Indeed, "[t]he only difference lies in the remedy — whether or not to enforce the summons, as opposed to whether or not to reverse a conviction [based on improperly admitted evidence]". *United States* v. *Garden State National Bank*, 607 F.2d 61, 69 n.11 (3d Cir. 1979).[3]

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[2]The summonses here called for bank records relating to petitioner's accounts. We do not concede that a defendant in a criminal case has standing to attack a summons issued to a third party in order to have evidence obtained therefrom suppressed. Compare *United States* v. *Sand*, 541 F.2d 1370 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977) (defendant lacks standing to suppress) with *United States* v. *Genser*, 582 F.2d 292, 305 (3d Cir. 1978), after remand, 595 F.2d 146, after remand, 602 F.2d 69, cert. denied, 444 U.S. 928 (1979). See generally *United States* v. *Miller*, 425 U.S. 435 (1976). At all events, there is no need to resolve this question since it is clear that petitioner's claim was properly rejected by the court of appeals for other reasons.

[3]Petitioner cites *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938) and *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548 (1943), in support of his argument here (Pet. 12). But in *Mitchell* this Court held only that an acquittal in a criminal case for willful evasion of taxes, where the standard of proof was "guilty beyond a reasonable doubt", could not be used collaterally by the taxpayer-defendant to bar assessment and collection of the so-called fraud penalty in a subsequent civil tax action, where the government's standard of proof is lower. 303 U.S. at 397. Here, as noted, the respective burdens of proof do not vary. In *Marcus* this court held that "civil" recoveries in excess of actual damages subsequent to criminal conviction and punishment did not offend the Double Jeopardy Clause (317 U.S. at 548-550); the holding there did not address any res judicata issue.

Petitioner also asserts (Pet. 12-13) that the doctrine of res judicata should not have been applied here because it has been held that search and seizure questions arising under the Fourth Amendment can be litigated in a civil action for damages and then may be relitigated in a criminal proceeding if the evidence obtained through the search and seizure is offered as evidence against the accused. But the only authority cited by the treatise upon which petitioner relies is a state case (*Brenon* v. *State*, 31 A.D.2d 776, 297 N.Y.S.2d 88 (1969)) that is inconsistent

4. Even if the judgment in the earlier proceeding were not res judicata here, petitioner has not shown that the summonses were issued in bad faith under this Court's decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

These summonses were issued only 28 days after the joint investigation commenced (Tr. 3, 5-A) and subsequent to the assignment of a revenue agent to the case (Tr. 4). Their issuance preceded the IRS's recommendation of criminal prosecution to the Department of Justice by almost two years (Tr. 5-A). In *LaSalle*, this Court clearly stated that the test in determining whether a summons was issued in bad faith is whether the IRS had abandoned, in an institutional sense, its civil determination of taxes due and their collection in the particular investigation at hand. 437 U.S. at 316, 318. The Court added that the burden of showing that a summons was issued in bad faith is a "heavy one" where the challenged summons was issued prior to IRS's recommendation of criminal prosecution to the Justice Department. *Id.* at 316. Here, there is not a trace of the extraordinary circumstances to which *LaSalle* pointed as examples of bad faith,[4] and the primary case on which petitioner relies (Pet. 6-10). *United States* v. *Dahlstrum*, 493 F. Supp. 966 (C.D.

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with the result in *United States* v. *Garden State National Bank*, *supra*. Moreover, the cases upon which *Brenon* relies all hold that a judgment in a criminal case is not admissible in a subsequent civil proceeding involving different parties, a point we do not dispute.

[4] *E.g.*, IRS delay in submitting a recommendation, following an institution commitment to make the referral, simply to gather additional evidence for the prosecution; the gathering of information by the IRS for other agencies, regardless of the status of criminal cases. 437 U.S. at 316-317.

Cal. 1980), is a district court case, which the Ninth Circuit, in dismissing the appeal, specifically refused to "approve" as to the summons issue. *United States* v. *Dahlstrum*, 655 F.2d 971, 973 n.2 (1981), cert. denied, 455 U.S. 928 (1982).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[5]Petitioner seems to suggest (Pet. 9-10) that there is a conflict between *United States* v. *Genser*, 595 F.2d 146 (3d Cir.), cert. denied, 444 U.S. 928 (1979), and *United States* v. *Schutterle*, 586 F.2d 1201 (8th Cir. 1978). However, petitioner wisely does not argue that the decision of the court of appeals here was in conflict with the ruling of any other circuit; the court simply did not address the merits of the summons enforcement, having determined that consideration of the issue was barred by the doctrine of res judicata.

Petitioner also asserts (Pet. 6-10) that there is a conflict in the federal courts in the manner in which they treat a claim that a summons is being improperly utilized for the sole purpose of uncovering evidence of criminal violations. We do not agree that there is any conflict. But even if there were, review by this Court would not be warranted because Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) has recently been amended by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Section 333, 96 Stat. 622-623, to permit the IRS to use a summons solely for the purpose of inquiring into criminal violations.